

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

<b>STATE OF MAINE, et al.,</b>	)	
	)	
<b>Plaintiffs</b>	)	
	)	
<b>v.</b>	)	<b>No. 1:14-cv-00264-JDL</b>
	)	
<b>GINA McCARTHY, et al.,</b>	)	
	)	
<b>Defendants</b>	)	

**REPORT OF HEARING AND ORDER RE:  
COMPETING MOTIONS FOR BRIEFING SCHEDULE**

Held in Portland by telephone on February 2, 2017, at 10:30 a.m.

Presiding: John H. Rich III, United States Magistrate Judge

Appearances: For the Plaintiffs: Scott Boak, Esq.

For the EPA Defendants: David Carson, Esq.  
John Osborn, Esq.

For the Intervenor Maliseet Defendant: Jane Steadman, Esq.  
Graydon Stevens, Esq.

For the Intervenor Penobscot Defendant: Kaighn Smith, Jr., Esq.  
David Kallin, Esq.

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The telephone conference was held pursuant to my report and order dated January 11, 2017, ECF No. 74, to resolve the parties' competing motions, ECF Nos. 79, 80, for the entry of a briefing schedule to resolve the merits of this case.

Following oral argument, I **GRANTED** the defendants' motion with modifications, and **DENIED** that of the plaintiffs, except to the extent reflected in my modifications.

The two key issues presented by the competing motions were (i) whether the parties should file simultaneous cross-motions, as proposed by the plaintiffs, or whether the plaintiffs should file their cross-motion first, as proposed by the defendants, and (ii) whether the defendants should be permitted to file separate briefs, rather than combined briefs as proposed by the plaintiffs.

On the first issue, the plaintiffs contended that this was not a run-of-the-mill Administrative Procedure Act (“APA”) appeal but, rather, a dispute over statutory meaning and effect, as a result of which it was fairer and more efficient for the parties to file cross-motions, an approach reflected in a scheduling order entered at ECF No. 98 in *Penobscot Nation, et al. v. Mills, et al.*, No. 1:12-cv-00254-GZS (D. Me.).

The defendants distinguished *Penobscot* on the bases that, in that case, the parties had agreed to the scheduling order, *Penobscot* was not an APA case, and the defendants had filed counterclaims. They argued that, in this case, in which the plaintiffs exclusively carry the burden of proof, as a matter of fairness and efficiency they should have to respond to, rather than anticipate, points raised by the plaintiffs. They contended that their approach would reduce wasteful briefing, commending as a model an amended scheduling order entered at ECF No. 11 in *Health & Human Servs., Me. Dep’t, et al. v. Health & Human Servs., US Dep’t, et al.*, No. 1:14-cv-00391-JDL (D. Me.) (attached as Exh. 1 (ECF No. 80-1) to their motion).

I **ADOPTED** the defendants’ proposal that the plaintiffs file their cross-motion first, agreeing that it was the more efficient, fair, and sensible model for this APA dispute in which no counterclaims have been raised.

On the second issue, the plaintiffs explained that they proposed combined briefing (either by all three defendants or, alternatively, in the form of separate briefing by the EPA defendants and combined briefing by the Tribal defendants) to promote fairness (equitable distribution of page

limitations for the plaintiffs *versus* the defendants collectively) and efficiency, avoiding the multiplication of briefs in this already complex case. The defendants countered that, as the court recognized in permitting the Tribes to intervene, the interests of the EPA defendants diverge from those of the Tribes. They added that the Tribes' own interests diverge, as each is a sovereign nation with its own interests and culture and, in the challenged EPA action, the EPA had invoked different statutory provisions as to each. Attorney Carson added that the EPA is not permitted to share drafts of briefs, impeding collaboration on joint briefing. Attorney Boak rejoined that the defendants' interests align in that all oppose the plaintiffs' bid for relief.

I **ADOPTED** the defendants' proposal to permit the EPA defendants and each of the Tribal defendants to file separate briefs in recognition of their professed divergent interests, the grant of intervenor status to the Tribes, each Tribe's status as a sovereign nation, the reasonable page limitations the defendants had proposed for their separate briefs, and the EPA defendants' inability to share drafts of briefs. However, I increased certain of the plaintiffs' page limitations to make greater allowance for their need to respond to separate briefs.

I raised a separate issue with the parties: whether their contemplated motions fairly could be characterized as motions for summary judgment without statements of material fact (as they had proposed), *versus* motions for judgment on an administrative record or, alternatively, for judgment on a stipulated record. The parties agreed that they contemplate motions for judgment on an administrative record, as supplemented by stipulations and other materials.

I advised the parties that I would set forth an Amended Scheduling Order, consistent herewith, that would become the operative Scheduling Order following a brief period during which I would permit the parties to file a joint motion to enter an alternate Scheduling Order. I have attached my Amended Scheduling Order hereto, and **DIRECT** that the parties file any such joint

motion no later than noon on Monday, February 13, 2017, failing which the Clerk's Office is **DIRECTED** to enter my Amended Scheduling Order forthwith on the ECF Docket. The parties retain their customary right to file an objection to this Report of Hearing and Order within 14 days of its entry on the docket.

At the conclusion of the teleconference, the parties made a joint oral motion to extend to February 22, 2017, their February 8, 2017, deadline to file any motion(s) to further supplement the record or provide additional legal authorities as an aid to the court. *See* ECF No. 74 at 3. I **GRANTED** that motion. Attorney Boak questioned whether it would be permissible to file additional materials with the court on a compact disc. Attorney Carson noted that the EPA defendants had been permitted to file the administrative record in that manner. *See* ECF Nos. 37-38. On that understanding, I advised that this would be acceptable.

**SO ORDERED.**

#### **CERTIFICATE AND NOTICE**

- A. This report fairly reflects the actions taken at the hearing and shall be filed forthwith.
- B. In accordance with Fed. R. Civ. P. 72(a), a party may serve and file an objection to this order within fourteen (14) days after being served with a copy thereof. Failure to file a timely objection shall constitute a waiver of the right to review by the district court and to any further appeal of this order.

Dated this 5<sup>th</sup> day of February, 2017.

/s/ John H. Rich III  
John H. Rich III  
United States Magistrate Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

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	)	
Plaintiffs	)	
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v.	)	No. 1:14-cv-00264-JDL
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GINA McCARTHY, et al.,	)	
	)	
Defendants	)	

**[PROPOSED] AMENDED SCHEDULING ORDER**

In accordance with my Report of Hearing and Order dated February 5, 2017, the Scheduling Order (ECF No. 57), as amended, is **SUPERSEDED** as follows:

Track Assignment: This case has been assigned to the Administrative Track. Discovery is prohibited entirely unless specific approval is obtained from a judicial officer.

Subject Matter Jurisdiction: U.S. Government Defendant

Trial: None contemplated.

Deadline for Motion(s) To Supplement the Administrative Record or To Provide Additional Legal Authorities as an Aid to Court: February 22, 2017.

Deadline for Plaintiffs To File a Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum (90 days after entry of amended order): May 15, 2017, not to exceed 60 pages in length.

Deadline for *Amici* Supporting Plaintiffs' Position To File Motions for Leave To File Briefs, attaching Proposed Brief(s) (14 days after plaintiffs' brief): May 30, 2017, each brief not to exceed 12 pages in length. If, as anticipated, two such motions are filed, the *amici* may, at their election, file a combined brief not to exceed 20 pages in length.

Deadline for EPA Defendants To File a Combined Response/Cross-Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum (90 days after amici): August 28, 2017, not to exceed 70 pages in length.

Deadline for Each Tribal Defendant To File a Combined Response/Cross Motion for Judgment on the Administrative Record as Supplemented, with Incorporated Memorandum (10 days after EPA): September 7, 2017, each response/cross-motion not to exceed 35 pages in length.

Deadline for *Amici* Supporting Defendants' Position To File Motions for Leave To File Briefs, attaching Proposed Brief(s) (14 days after Tribes' briefs): September 21, 2017, each brief not to exceed 12 pages in length. If, as anticipated, two such motions are filed, the *amici* may, at their election, file a combined brief not to exceed 20 pages in length.

Deadline for Plaintiffs To File a Combined Reply/Response Brief (60 days after amici): November 20, 2017, not to exceed 70 pages in length.

Deadline for EPA Defendants and Each Tribal Defendant To File a Reply Brief (40 days after plaintiffs' brief): January 2, 2018, each brief not to exceed 15 pages in length.

Deadline for Plaintiffs To File a Surreply (30 days after reply briefs): February 1, 2018, not to exceed 15 pages in length. The plaintiffs' surreply shall not raise any new arguments.

**SO ORDERED.**

Dated this 13<sup>th</sup> day of February, 2017.

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John H. Rich III  
United States Magistrate Judge